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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.988 OF 1998

Shri Bhagwandas Meghji Thakkar)
Age 71 years, Occu.: Business,)
Residing at First floor, Above)
the shop known as Vijay Emporium)
Jambhli Naka, Station Road,)
Thane.) ... Petitioner

Versus

1. Shri Kamalakar Baburao Patil)
heir and legal representative)
of deceased Smt. Sitabai)
Baburao Patil, residing at)
Madhav Apartment, Chandanwadi)
Almedia Road, Panchpakkadi,)
Thane.)

2. Shri Kondiba Ghadge,)
Age about 45 years, Occu. :)
Business.)

3. Shri Niyas Ahmed, Age about)
45 years, Occu: Business,)

Nos.2 and 3 are residing at Sita)
Ashram, Patil Wadi,Near Mahagiri)
Masjid, Mahagiri, Thane.) ... Respondents

Mr. R.S. Apte with Mr. M.V. Limaye for the petitioner.

Ms. Gauri Godse for respondent 1.

CORAM: SMT. RANJANA DESAI, J.

DATED: 22ND/23RD AUGUST, 2005.

ORAL JUDGMENT:-

1. The petitioner is original defendant 1. Respondent 1 is the heir and legal representative of the plaintiff. Respondents 2 and 3 are original defendants 2 and 3 respectively. For the sake of convenience, the parties

will be referred to in this judgment as per their status in the trial court.

2. The plaintiff landlady filed a suit for eviction against the defendants on the grounds of change of user, permanent construction, sub-letting and non-user. The plaintiff also alleged that there are arrears of rent but, no decree was passed on that ground. The trial court dismissed the suit on 29/7/1994. The plaintiff carried an appeal to the District Court being Civil Appeal No.463 of 1994. The lower appellate court by its judgment and order dated 28/11/1997 allowed the appeal. The judgment and decree passed by the trial court was set aside and the defendants were directed to deliver vacant and peaceful possession of the suit premises to the plaintiff. The said judgment and order is challenged in this petition.

3. According to the plaintiff, she is the owner and landlady of the suit property bearing Tika No.3, C.T.S. No.62, along with structure standing thereon situated at Mahagiri, Masjid Road, Thane. Till the termination of the tenancy, defendant 1 was a monthly tenant of the plaintiff in the suit property in respect of three different plots of lands admeasuring 9' x 8 1/2', 36' x 9' and 23' x 9' on the monthly rent of Rs.20/-. The plaintiff contended that defendant 1 was dealing in building materials and all the three open plots were let out to him for keeping and storing building materials.

Defendant 1 was not using the open plot admeasuring 36’ x 9’ for the purpose for which it was let out to him, for a continuous period of more than six months, without any reasonable cause. According to her, defendant 2 constructed a wooden structure on the said plot and he used to store tiles, cement, etc. therein. In or about 1982, defendant 1 constructed a permanent structure in bricks and cement in place of old wooden structure and divided the said permanent structure in three equal parts. In 1982, defendant 1 sub-let, assigned and/or transferred his interest in one part of the structure in favour of defendant 2, who is residing in the suit structure along with his family. In the year 1982, defendant 1 sub-let, assigned and transferred his interest in another part of the structure to one Baba Baniya, who was residing therein till the end of 1983. Thereafter from 1984, till today, defendant 3 is residing in the said part with his family members. Defendant 1 is recovering rent from defendant 3. Since, the lower appellate court has passed the decree only on the grounds of change of user and sub-letting, it is not necessary for me to go into the other facts averred in the plaint.

4. I have heard, at some length, Mr. Apte, the learned counsel appearing for the petitioner and Ms. Godse, the learned counsel appearing for respondent 1 and with their assistance, I have perused the judgments and the record of the case.

5. Mr. Apte, the learned counsel appearing for the petitioner contended that the lower appellate court has erred in disturbing the judgment and decree of the trial court. He submitted that the trial court has upon proper marshalling of the facts come to an unassailable conclusion that defendant 1 had not changed the user nor has he sub-let the suit property. He contended that defendant 1 cannot be evicted on the ground of change of user because in the agreement of lease between him and the predecessor in title of the plaintiff, which is at Ex-41, it is stated that since beginning the structures were standing on the suit property and the said structures were meant for storing building materials. The learned counsel submitted that it is, therefore, evident that the structures were in existence right from the beginning and, therefore, there is no question of defendant 1 constructing them. He submitted that the fact that the building materials are stored in the said structures is not disputed by the plaintiff. In fact, the plaintiff has in her evidence stated that she had gone to the suit property after 10 years and, therefore, she is not even aware of the exact position of the suit property. According to Mr. Apte, the lower appellate court has lost sight of this vital aspect and mixed up the issue of change of user with sub-letting. He submitted that if the building materials are, in fact, stored in the suit structures, there can be no change of user. He contended that the lower appellate court has, in a very perfunctory manner, reversed the findings of

the trial court on the question of change of user without even analysing the evidence properly.

6. Mr. Apte further contended that the lower appellate court has also erred in holding that the suit structure is sub-let by defendant 1 to defendant 3. He submitted that it is the case of defendant 1 that defendant 3 came in the suit structure in the year 1970. In the year 1970 there were Hindu-Muslim riots and, at the request of one Maulana, defendant 1 allowed him to stay in the suit structure. He was allowed to stay in the suit structure purely on humanitarian ground. There is no evidence on record to show that any rent was accepted by defendant 1 from defendant 3. Therefore, the case of sub-tenancy is not made out at all and the lower appellate court erred in reversing the findings of the trial court in that behalf. The learned counsel contended that in any case since defendant 3 was possession from 1970 i.e. prior to 1/2/1973 assuming he is a sub-tenant, still he is protected and he cannot be evicted from the suit structure.

7. Mr. Apte drew my attention to the issues framed by the trial court and in particular issue No.3 which reads as follows: "Whether the plaintiff proves that defendant 1 has carried out permanent construction on the suit plot admeasuring 36’ x 9’ without his consent and has constructed three tenements illegally" and issue no.4 which reads as follows" "Whether the plaintiff proves

that defendant 1 has illegally sub-let two parts of the said tenement to defendants 2 and 3". Mr. Apte contended that therefore, the trial court was dealing with a part of construction on the plot admeasuring 36' x 9' and even the lower appellate court has while passing the decree concentrated only on that portion and, therefore, this court should pass a partial decree.

8. It is the case of the plaintiff that she is the owner of the suit property. Defendant 1 was her monthly tenant in respect of three open plots admeasuring (1) 36' x 9', (2) 9' x 8 1/2 and (3) 23' x 9 till termination of his tenancy. Admittedly, there is a structure on the plot which is 36' x 9'. The said structure is divided into three parts. It is also an admitted fact that defendant 2 is occupying one part and defendant 3 is occupying another part. According to defendant 1, he is storing the materials in one part. It is the case of the plaintiff that defendant 1 has sub-let/assigned and/or transferred two parts to defendants 2 and 3 respectively. Defendants 1 has denied this. It is his case that defendant 2 is his servant and he used to load and unload the storing materials and used to look after the stored materials of defendant 1. It must be stated here that so far as defendant 2 is concerned, the lower appellate court has held that he is not a sub-tenant of defendant 1. It is, therefore, not necessary for me to go into that aspect of the matter.

9. So far as defendant 3 is concerned, defendant 1's case is that on account of communal riots which took place in the year 1970, he was accommodated in the suit structure at the request of one of his friends and no rent was charged to him. According to defendant 1, defendant 3 was allowed to occupy the suit structure purely on humanitarian grounds. This fact has been averred in the written statement and has also been deposed in the court by defendant 1. According to the plaintiff, however, defendant 3 has been staying in the suit structure from the year 1983.

10. Mr. Apte, the learned counsel for defendant 1 contended that both the courts have held that defendant 2 is not the tenant of defendant 1. Defendant 2's presence at the suit property is admitted. In his written statement defendant 2 has stated that defendant 3 is residing in the suit structure from 1970. This supports defendant 1's case. The learned counsel submitted that the plaintiff has not produced any rent receipts to prove that defendant 3 is the sub-tenant of defendant 1. The plaintiff's case is, therefore, not substantiated.

11. I am not impressed by these submissions. The plaintiff has in his plaint come out with a categorical assertion that defendant 3 is residing in the suit structure from 1984. The fact that he is occupying the suit structure is admitted. What is sought to be contended is that he was allowed to occupy the suit

structure on humanitarian ground and no rent is being charged for the occupation. It is significant to note that it is not the case of defendant 1 that defendant 3 is his servant or that he is helping him in his business. Therefore, the case put up by defendant 1 that since the year 1970, defendant 3 was allowed to occupy the suit premises without payment of rent and purely on humanitarian ground is inherently improbable and is not established by the evidence at all. No one could allow any person to occupy his premises free of charge for such a long time. So far as the argument that to spell out tenancy, the plaintiff ought to have produced the rent receipts is concerned, I have no hesitation in rejecting it. In **Joginder Singh Sodhi v. Amar Kaur, (2005) 1 SCC 31**, the Supreme Court was dealing with some what similar argument. The Supreme Court referred to its earlier judgment in **Bharat Sales Ltd. v. LIC of India, (1998) 3 SCC 1**, and observed that sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. It was further observed that this arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered and in this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the

landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person in possession of that property. The Supreme Court further observed that in such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It was further observed that it would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. The Supreme Court further observed that payment of rent, undoubtedly is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let.

12. Viewed in the light of the above observations of the Supreme Court, I am of the opinion that merely because

the rent receipts are not on record and there is no evidence to indicate that monetary transaction took place between defendant 1 and defendant 3, the plaintiff cannot be nonsuited. Other circumstances on record clearly establish creation of sub-tenancy.

13. There is yet one more aspect of the matter which needs to be looked at. Defendant 3 has remained absent. He did not file any written statement nor did he step in the witness box. If indeed defendant 1 has allowed him to stay in the suit premises without charging any rent to him, he ought to have stepped in the witness box to help defendant 1 and state so in the court. Adverse inference needs to be drawn from the fact that defendant 3 has not stepped in the witness box. It may be that in his written statement, defendant 2 has stated that defendant 3 was there in the suit premises since 1970 but that will not help defendant 1 in the absence of any evidence to that effect. Defendant 2 is bound to support defendant 1. Defendant 3 should have filed written statement and should have examined himself. I have, therefore, no hesitation in concurring with the lower appellate court that defendant 1 has sub-let the suit premises to defendant 3.

14. So far as the change of user is concerned, in the lease agreement (Ex-41), which is entered into by the original owner Khimji with defendant 1, there is a specific term that defendant 1 will not transfer or

sub-let the suit property in any manner. Therefore, undoubtedly, defendant 3 is occupying the suit structure in contravention of the terms of the lease agreement. It was argued that there cannot be change of user because defendant 1 is, in fact, storing building materials in the suit structure. But defendant 1 has not established that defendant 3 is his servant and as such is helping him in his business or is looking after the stored material or is loading or unloading the material. Obviously, therefore, defendant 3 is occupying the suit structure for residential purpose. Therefore, the suit structure which was let out for business purpose is now being used for residential purpose and, therefore, the case of change of user is undoubtedly made out. The lower appellate court is, therefore, right in holding that there is change of user.

15. I find no substance in the submission of Mr. Apte that the court should pass a partial decree in this case. First of all, the suit is not filed on the ground that the landlord reasonably and bonafide requires the suit premises. Section 13(2) of the Rent Act would, therefore, be not applicable. In any case, this ground was neither raised in the trial court nor in the lower appellate court. No foundation is led for it. Hence, this submission of Mr. Apte is rejected.

16. In the circumstances, I find no infirmity in the judgment of the lower appellate court. There is no merit in the petition. Petition is, therefore, rejected.

17. Rule discharged.

(SMT. RANJANA DESAI, J.)